88-1853

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE
SUPREME COURT OF
THE UNITED STATES

October Term, 1988

STANLEY STERNER, ET AL.,
Petitioner Pro Se

v.

COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR CERTIORARI

STANLEY STERNER
Petitioner Pro Se
2544 Wilson Blvd.
Apt. No. 104
Winchester, Va. 22601
(703) 667-6246

QUESTIONS PRESENTED

1. Did Fourth Circuit overlook and misconstrue an important question of federal law in a way that conflicts with applicable decisions of this Court with respect to the respondent's unconstitutional promulgation and application of 26 C.F.R. §301.6211-1(a)

2. Did Fourth Circuit's holding that the taxpayer has no constitutional right to refuse to file an income tax return and that respondent is not obliged to prepare a return on a taxpayer's behalf, conflict with and contradict the decisions of the Second, Fourth and Ninth Circuits.

3. Did Fourth Circuit's decision to approve the tax court's imposition of 26 U.S.C. Section 6673 damages against petitioner, conflict with and contradict the decisions of the Eighth and

Third Circuits in that said penalty statute is unconstitutional on its face and in its application.

4. Are 28 U.S.C. Section 1912, And Rule 38 Of The Federal Rules Of Appellate Procedure unconstitutional on their face and as applied by the Fourth Circuit does it conflict with the decisions of the Tenth Circuit.

5. Are Income tax returns and the laws thereof unconstitutional on their face and in their application.

LIST OF PARTIES

The petitioner, Stanley Sterner, is an individual with legal residence now at 2544 Wilson Blvd. Apt. No. 104, Winchester, Va. 22601.

The respondent is the Commissioner of the Internal Revenue Service of the U.S. Department of Treasury and is sued in

his official capacity. His official duties include inter alia: a. the making of income tax returns pursuant to 26 U.S.C. Sections 6201(a) and 6020(b)(1): b. the assessment and recordation of taxpayer's liability pursuant to 26 U.S.C. Section 6203: c. the promulgation, application, and interpretation of treasury regulations pursuant to 26 U.S.C Section 7805(a).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit decided on January 20, 1989 is not reported (App. A, infra, 57). The Order of Dismissal and Decision (App. B, infra, 61) and the Memorandum Sur Order (App. C, infra, 63) of the United States Tax Court entered on March 15, 1988 were not reported. The opinion of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing with suggestion for rehearing in banc was filed February 15, 1989 is not reported (App. D, infra, 83).

JURISDICTION

The Petitioner seeks review of the judgment of the Fourth Circuit Court of Appeals decided January 20, 1989 (App. A, infra, 57).

Petitioner's petition for rehearing with suggestion for rehearing in banc was denied February 15, 1989 (App. D, infra, 83).

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and Rule 17.1 (a) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTION, STATUTES AND REGULATIONS

The pertinent provisions of Article I, Section 1 and Section 9, Clause 3 of the United States Constitution, the First, Fifth, Seventh, Ninth and Sixteenth Amendments of the Federal Constitution, 26 U.S.C. Sections 6020(a), 6020(b)(1), 6201(a)(1), 6211(a) and 26 C.F.R. Section 301.6211-1(a), and 26 U.S.C. Sections 6651, 6653(a)(1)(A) and (B), 6654(e)(3)(A), 6661(c), 6673, 7805(a), 28 U.S.C. Section 1912, Federal Rules of Appellate Procedure Rule 38 and

Rule 11 of the Federal Rules of Civil Procedure are set forth in Appendix H, infra, 89.

STATEMENT OF THE CASE

The respondent filed a Notice of Deficiency dated October 2, 1987, against the petitioner for the taxable years of 1981-1984.

The petitioner filed a timely Petition with the Tax Court dated December 21, 1987, disputing each of the items contained in the Notice of Deficiency dated October 2, 1987, claiming inter alia that: the respondent failed to make a return and determinations based on returns for each of the years in question, thereby rendering determinations and notice thereof null and void and leaving nothing on which Tax Court jurisdiction can rest.

The respondent filed a Motion to Dis-

miss and Award Damages pursuant to Rule 40 and IRC Section 6673, respectively, against the petitioner, dated February 2, 1988.

The petitioner filed a timely Notice of Objection with the Tax Court dated February 22, 1988, claiming inter alia: a) that respondent and his agents have maliciously if not willfully and wantonly violated petitioner's Federal Fifth Amendment right not to be compelled to be a witness against himself by imposing penalties and deficiencies against him for failing to file testimonial returns for the years in question; b) that the Tax Court would be violating petitioner's Federal Seventh Amendment rights, unless it impaneled a civil jury on the questions of fact with respect to petitioner's claims for compensatory and pu-

nitive damages against the respondent and his agents; c) that the respondent has failed to provide any evidence or scintilla thereof concerning his claim that petitioner has instituted his petition with the Tax Court primarily for delay and to protest paying income taxes, thereby making null and void any award of IRC Section 6673 damages against the petitioner; d) that IRC Section 6673 damages are unconstitutional on its face and in its application in that it violates petitioner's Federal First, Fifth and Seventh Amendment rights, to petition Tax Court, due process of the law and to have a civil jury on the factual issues of damages, respectively; e) that the Tax Court is unconstitutional in that it has no authority to impanel a civil jury on the factual issues of damages; f) that the Tax

Court lacks jurisdiction with respect to respondent's purported Notice of Deficiency which is null and void, in that its determinations are not based on returns as required by law.

The Tax Court entered its Memorandum Sur Order (App. C, infra, 63) on March 15, 1988, dismissing petitioner's petition, ruling that: a) there are deficiencies and additions to petitioner's Federal income taxes; b) the notice of deficiency is not required to be based upon tax returns; c) that petitioner is reuired to make returns; d) the making of returns by petitioner does not violate his Fifth Amendment privilege with respect to self-incrimination; e) the petitioner is not constitutionally entitled to trial by jury on the issues of damages and compensation; f) the peti-

tioner has maintained this case primarily for delay and that petition is frivolous and groundless; and g) the awarding of damages against the petitioner in the amount of $5,000 pursuant to IRC Section 6673 is constitutional.

Petitioner filed a timely notice of appeal from the Tax Court's decision on June 10, 1988.

August 1, 1988 a timely Informal Brief was filed with U.S. Court of Appeals for the 4th Circuit by the petitioner, Stanley Sterner, appealing the Tax Court's decision (App. C, infra, 63) dated the 15th day of March 1988, petitioner appealed respondent's Notice of Deficiency dated October 2, 1987, with respect to making determinations contained in said notice of deficiency, without making the required returns for any of the taxable years in question thus omitting all

taxes previously collected by petitioner's employer. The petitioner also appealed said decision with respect to the Tax Court's ruling that: 1. taxpayer's Federal Fifth Amendment rights have not been abrogated or abridged: 2. petitioner has no Federal constitutional rights to a jury trial in the Tax Court; 3. petitioner's petition be dismissed for failing to state a claim upon which relief can be granted: and 4. petitioner pay $5,000.00 in damages to respondent, pursuant to IRC section 6673.

On September 1, 1988 a timely Informal Reply Brief was filed with the U.S. Court of Appeals for the 4th Circuit by the petitioner, Stanley Sterner, in reply to the aforesaid dilatory Brief of the respondent dated August 23, 1988, in which the petitioner claimed inter alia

that: a. rules 34(b)(4), 34(b)(5), and 40 Of The Rules Of Practice and Procedure of The United States Tax Court (Jan. 16, 1984) are unconstitutional as applied and/or on their face; b. that Internal Revenue Code Section 6673 is unconstitutional on its face and/or in its application; c. that respondent's dilatory Brief should be denied or dismissed for violating Rule 26(b) of the Rules of the Federal Rules of Appellate Procedure for failing to move the Court of Appeals for the 4th Circuit for an enlargement of time as prescribed by Order To Proceed On Informal Brief, filed July 12, 1988, and to do so for good cause. That is respondent's Brief was required to be mailed to the Court of Appeals for the 4th Circuit, with copies to all parties no later than 14 days after receipt of petitioner's Brief, which

was received by respondent on or about August 1, 1988, whereas respondent's Brief was not mailed until August 23, 1988, or well over 7 days beyond the prescribed time of the Court of Appeals for the 4th Circuit.

On January 6, 1989 petitioner filed a timely complaint for a preliminary injunction in the United States District Court for the Western District of Virginia, Harrisonburg Division against the respondent. Said complaint was similar in content to his Petition with the Tax Court dated December 21, 1987 and his August 1, 1988 timely Informal Brief filed with U.S. Court of Appeals for the 4th Circuit.

On January 18, 1989 petitioner filed a Memorandum in Support of preliminary injunction in the United States District

Court for the Western District of Virginia, Harrisonburg Division against the respondent.

In January, 1989 the respondent filed a motion to dismiss and request for sanctions against petitioner in the United States District Court for the Western District of Virginia, Harrisonburg Division. Respondent requested sanctions against petitioner for having filed a frivolous action, pursuant to Rule 11 of the Federal Rules of Civil Procedure, seeking an award of attorney fees and costs against the petitioner.

On January 31, 1989 petitioner filed an Opposition to respondents' motion to dismiss and request for sanctions, in the United States District Court for the Western District of Virginia, Harrisonburg Division, claiming inter alia that Rule 11 of the Federal Rules of Civil

Procedure which provides for sanctions for willful violation of this rule, unconstitutionally and facially violates petitioner's Seventh Amendment rights to a trial by jury on the factual issues of damages and willfulness.

On February 3, 1989 the United States District Court for the Western District of Virginia, Harrisonburg Division (App. F, infra, 85) ordered respondent's motion for sanctions be denied and granted his motion to dismiss petitioner's motion for preliminary injunction.

On January 20, 1989 the Fourth Circuit Court of Appeals (App. A, infra, 57) affirmed Tax Court's decision and ruled that: a) respondent is not obliged to prepare a return on a taxpayer's behalf before determining a deficiency; b)

there is no constitutional right to refuse to file an income tax return; c) the tax court properly denied Sterner's request for a jury trial on the basis that there is no right to a jury trial in tax court; d) the court properly granted the Commissioner's motion to dismiss because Sterner failed to meet his burden to set forth facts showing that the Commissioner's deficiency determination was incorrect; e) contrary to Sterner's arguments, we find no unconstitutionality, either on its face or as applied, in the tax court rule governing motions to dismiss. Tax Ct. R. 34(b). f) it approved the tax court's imposition of the penalty provided for by 26 U.S.C. § 6673; g) Sterner has no constitutional right to litigate frivolous claims without being sanctioned and award the Commissioner attorneys' fees and double

costs incurred on appeal. See 28 U.S.C. §1912; Fed.R.App.P.38. The amount of $1500 requested by the Commissioner in lieu of particularized fees and costs is approved.

The petitioner filed a timely petition for rehearing, with suggestion for rehearing in banc in the United States Court of Appeals for the Fourth Circuit dated February 2, 1989, claiming inter alia that: a) Treasury Regulations Sec. 301.6211-1(a) (26 CFR) is unconstitutional on its face and in its application; b) the Commissioner failed to deduct the taxes paid by Sterner and collected by his employer by treating said amounts as zero; c) the Court has misconstrued a legal and factual matter in holding that the taxpayer has no constitutional right to refuse to file an in-

come tax return: d) the Court has overlooked a legal and factual matter by failing to deny or dismiss the Commissioner's Informal Brief; e) Material legal and factual matters were overlooked by this Court with respect to penalty statutes 26 USC Secs. 6651(a)(1), 6653 (a)(1)(A), 6653(a)(2), 6654 and 6661(c) which are unconstitutional on their face and in their application.

On February 15, 1989 the Fourth Circuit Court of Appeals (App. D, infra, 83) denied petitioner's petition for rehearing with suggestion for rehearing in banc.

ARGUMENT

1. The Fourth Circuit overlooked and misconstrued an important question of federal law in a way that conflicts with applicable decisions of this Court with respect to the respondent's unconstitu-

tional promulgation and application of 26 C.F.R. §301.6211-1(a)

In Laing v. U.S., 96 S.Ct. 473 (1976) the Supreme Court states in pertinent part that:

> * * * In the 1921 Act the word "deficiency" was used in its colloquial sense to mean the amount of tax remaining unpaid at the time the tax was due, and that no significance was attached to whether a return had been filed at that time.
> At n. 25, 96 S.Ct. at 484.

In the instant case the respondent in the application and promulgation of Treasury Regulation Section (26CFR) 301.6211-1(a) goes well beyond the boundaries contemplated by congress with respect to the underlying statute (26 USC Section 6211(a)) in penalizing the petitioner for his nonreturn by computing the amount of taxes collected by petitioner's employer as zero and thus adding significance to whether a return had

been filed at that time. The Supreme Court at 484, further states in pertinent part that:

> Section 273 of the 1924 Act defined "deficiency," much as it is now defined, as the amount by which the tax due exceeds the tax shown on the taxpayer's return, or, "If no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency." Section 273(2). * * *

In the instant case no return was made by petitioner yet the respondent chose to ignore the amount of taxes collected by the petitioner's employer and computed the amount of taxes paid by petitioner as zero.

Miller v. U.S., 680 F.Supp. 1269 (C.D. Ill.1988) and City of Tucson, Ariz v. CIR, 820 F.2d 1283 (DC Cir 1987) stand for the proposition that a Treasury Regulation is null and invalid when it enlarges both the statutes coverage and the department's administrative authori-

ty beyond the boundaries contemplated by congress. In the instant case Treasury Regulation Sec. 301.6211-1(a) (26CFR) goes beyond the boundaries contemplated by congress in the underlying statute (26 USC Sec. 6211(a)) by penalizing the petitioner for his nonreturn by computing the amount of taxes collected by petitioner's employer as zero. Thus Treasury Regulations Section 301.6211-1 (a) is null and invalid in that it enlarges both the statutes coverage and the department's administrative authority beyond the boundaries contemplated by congress.

City of Tucson, supra, stands for the proposition that taxing statutes should be strictly construed and any doubt should be resolved in favor of the taxpayer. At 1288, n.31. Taxing statutes

are to be construed liberally in favor of the taxpayer. U.S. v. Havner, 101 F.2d 161 (8th Cir. 1939): U.S. v. Updike, 50 S.Ct. 367 (1930): Bowers v. New York & Lighterage Co., 47 S.Ct. 389 (1927): Gould v. Gould, 38 S.Ct. 53 (1917).

In the case at bar Treasury Regulations Section 301.6211-1(a) construes the underlying taxing statute (26 USC Sec. 6211(a)) in an overly broad manner against the petitioner. That is that nowhere in the aforesaid taxing statute does congress contemplate adding any significance to whether or not taxpayer has filed a return or punish taxpayer for failure to make a return, by treating any amount of tax previously paid or collected from taxpayer as zero.

In Rowan Companies, Inc. v. U.S., 101 S.Ct. 2288,2292 (1981) the Supreme Court

states in pertinent part that:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose.

In the instant case Treasury Regulations Section 301.6211-1(a) fails to carry out the congressional mandate in a proper manner, fails to harmonize with the plain language of the statute (26 USC Sec. 6211(a)), its origin, and its purpose. That is when there is no return said regulation computes amount of taxes collected or paid with or without assessment against the taxpayer as zero. Whereas the plain language of the underlying statute computes the amount of taxes due or the deficiency, when there is no return as the amount by which the tax exceeds the amount of taxes previously collected with or without assess-

ment as the amount of taxes due. Laing, supra.

Treasury Regulation Sec. 301.6211-1(a) (26 CFR) is unconstitutional on its face and in its application. This is a concealed, unauthorized, and illegal penalty which was imposed by the respondent against the petitioner in violation of petitioner's Fifth Amendment right not to be a witness against himself in that it compels petitioner to make a testimonial return or have all his previously collected taxes computed as zero.

The Notice of Deficiency failed to deduct the taxes previously collected by petitioner's employer as required by 26 USC Sec. 6211(a) and Laing, supra.

Thus the Fourth Circuit's decision overlooks and misconstrues an important question of federal law with respect to

the respondent's unconstitutional promulgation and application of 26 C.F.R. Sec. 301.6211-1(a) and is contrary to and conflicts with applicable decisions of this Court in the case of Laing, supra.

The IRS is an unconstitutional agency, that violates the principle of separation of powers, undermines our system of checks and balances and is taxation without representation, in that it has legislative powers with respect to promulgating Treasury Regulations, such as Sec. 301.6211-1(a) pursuant to 26 USC Sec. 7805(a) which grants the respondent legislative powers in violation of Article I, Section 1, of the United States Constitution.

2. The Fourth Circuit's holding that the taxpayer has no constitutional right to refuse to file an income tax return

and that respondent is not obliged to prepare a return on a taxpayer's behalf, is in conflict with and is contrary to the decisions of the Second, Fourth and Ninth Circuits.

In In Re Magnus, Mabee & Reynard, Inc., 311 F.2d 12 (2nd Cir.1962), the Second Circuit states in relevant part that:

> A taxpayer may refuse to file any return whatever and take his chances; in that case he can stand upon his constitutional privileges against producing any evidence against himself....(citation omitted).

The Second Circuit also stated in pertinent part that:

> The Secretary or his delegate is charged with the responsibility of "making a return where none has been made" and verifying such returns as have been filed. The necessity of determining the correct tax liability and whether.... the tax and penalty may still be payable....(Emphasis Added)

In the instant case the Fourth Circuit's decision that the petitioner has

no Fifth Amendment right to refuse to file an income tax return and that the respondent is not required to file or prepare a return on his behalf, is clearly contrary to the Second Circuit's decision in In Re Magnus, Mabee & Reynard, Inc., supra.

The respondent willfully, intentionally and negligently failed to prepare and file the petitioner's tax return or statement in a timely manner, for the calendar years in question, as required and authorized by IRC Section 6201, which states in relevant part that:

(a)The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes imposed by this title, ... Such authority shall extend to and include the following:
(1)The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title....(Emphasis Added)

In the instant case the Fourth Circuit's

decision is contrary to the plain language of 26 U.S.C. Sec. 6201 which requires and authorizes the respondent to make all returns imposed under this title and does so expressly and clearly and in no uncertain terms. The same cannot be said for the petitioner, in that there are no such statutes which so expressly and clearly and in no uncertain terms authorize and require the petitioner to make assessments and returns.

Congress and not the people, are required to assess and collect income tax, pursuant to the Sixteenth Amendment of the Federal Constitution, which states in relevant part that:

> The Congress shall have the power to lay and collect taxes on incomes ...

In the instant case the respondent failed to make returns for the petitioner as required by IRC Section 6020

(b)(1), which states in relevant part that:

> If any person fails to make any return required by an internal revenue law or regulation made thereunder at the time prescribed therefor, ..., the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

In Ballou v. Kemp, 92 F.2d 556 (1937), the Court held that the use of mandatory language in one part of statute and of permissive language in another part indicates purposeful selection, requiring that such language be construed literally. In the instant case IRC Section 6020 uses mandatory language (shall) and permissive language (may). In that IRC Section 6020(a) states in pertinent part that:

> ... the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person. (emphasis added)

And IRC Section 6020(b)(1), which states in relevant part that:

> If any person fails to make any return required by an internal revenue law or regulation made thereunder at the time prescribed therefor, ..., the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. (emphasis added)

26 U.S.C. Sections 6201 and 6020 further underscore the respondent's responsibility, authority and statutory obligation and duty to make returns where none have been made. In Re Magnus, Mabee & Reynard, Inc., supra.

In Abrams v. Commissioner, 787 F.2d 939 (4th Cir. 1986) the 4th Circuit states in pertinent part that:

> To qualify as a notice of deficiency, while a document need not assume any particular form, ...nevertheless, it must meet certain substantial requirements. There must be a statement that the Internal Revenue Service has examined a return and determined a deficiency. It must inform the taxpayer of the exact amount of the deficiency. (Citations

Omitted).....

In the instant case, the respondent's notice of deficiency, to petitioner, Stanley Sterner, fails to satisfy said requirements, in that notice fails to state that they have examined returns and determined deficiencies for the tax years in question.

In Scar v. C.I.R., 814 F.2d 1363 (9th Cir. 1987) the Ninth Circuit held that failure to make a determination via review of taxpayer's return renders the deficiency notice null and void and leaves nothing on which Tax Court jurisdiction can rest. In the instant case the respondent's failure to base notice on returns for the years in question resulted in the respondent's omission of all taxes previously paid by petitioner and collected by his employer.

Petitioner does not claim the narrow

privilege of self-incrimination, his claim is his Fifth Amendment right not to be a witness against himself, in that the preparation and filing of a return is testimonial compulsion in violation of petitioner's right not to be a witness against himself. U.S. v.Doe, 104 S. Ct.1237 (1984); U.S. v. Fox, 549 F.Supp. 1362 (S.D.N.Y.1982); Fisher v. U.S., 96 S.Ct. 1569 (1976); Garner v. U.S., 96 S.Ct. 1178 (1976); U.S. v. Harper, 397 F.Supp. 983 (E.D.Pa.1975); Couch v. U.S., 93 S.Ct. 611 (1973); Kastigar v. U.S., 92 S.Ct. 1653 (1972); Miranda v. State of Arizona, 86 S.Ct. 1602 (1966); In Re Magnus,Mabee & Reynard,Inc., 311 F.2d 12 (2nd Cir.1962); Ullman v. U.S., 76 S.Ct. 497 (1956).

Petitioner's obligation to file a return violates his Federal Fifth Amend-

ment right not to be compelled to be a witness against himself.

Thus Fourth Circuit's holding that the taxpayer has no constitutional right to refuse to file an income tax return and that the respondent is not obliged to prepare a return on a taxpayer's behalf, conflicts with and is contrary to the decisions of the 2nd,4th & 9th Circuits.

3. The Fourth Circuit's decision to approve the tax court's imposition of 26 U.S.C. Section 6673 damages against petitioner, conflicts with and is contrary to the decisions of the Eighth and Third Circuits in that said penalty statute is unconstitutional on its face and in its application.

In May v. C.I.R., 752 F.2d 1301 (8th Cir.1985) the Eighth Circuit admonishes the Tax Court to make specific findings of fact which justify imposition of dam-

ages under the applicable statute (26 U.S.C. Section 6673). In other cases, the Tax Court, by an order to show cause, should give the taxpayer the opportunity to establish good faith in filing the proceedings in the Tax Court and then make appropriate findings. In the instant case the respondent failed to show and allege willfulness, or lack of good faith on the part of the petitioner and violated the Fifth Amendment due process rights of the petitioner, in that the petitioner was not given any opportunity to establish good faith in filing the proceedings in the Tax Court with respect to respondent's allegations of frivolous arguments and dilatory tactics, in support of 26 U.S.C. Section 6673 damages, as required by May, supra.

In Sauers v. C.I.R., 771 F.2d 64 (3rd Cir.1985) the Third Circuit citing May, supra, held that the Tax Court may not impose damages under the provisions of 26 U.S.C. Section 6673 unless it finds willfulness or bad faith on the part of the taxpayer and makes formal findings of fact that justify an award.

In the case at bar the Tax Court makes no formal findings of fact with respect to willfulness or bad faith on the part of the taxpayer, in that there is no evidence or pattern of conduct to even suggest that taxpayer is instituting proceedings before the Tax Court primarily for delay or that his position before the Tax Court is frivolous or groundless, in that all of petitioner's pleadings, papers and other actions before the Tax Court were done in a timely manner, and done without requesting even

one extension, whereas in the case of May, supra. May had repeatedly requested and received extensions and in several instances had failed to respond to the Commissioner's various pleadings.

In the case at bar the petitioner complied with all deadlines for filing and did so without requesting any extensions yet despite this the Tax Court chose to impose 26 U.S.C. Section 6673 sanctions against the petitioner, without any formal findings of fact to justify an 26 U.S.C.Section 6673 damage award against the petitioner for allegedly instituting said suit primarily for delay or that his position before the Tax Court is frivolous or groundless.

Arguments which might today appear frivolous, may very well become well-established law in the future. May, supra.

In the case at bar the Tax Court characterized petitioner's petition as a protest to paying taxes, with frivolous arguments, in an effort to delay paying taxes, yet the Tax Court had no facts or evidence in support of its imposition of 26 U.S.C. Section 6673 damages against the petitioner.

26 U.S.C. Section 6673 is unconstitutional on its face and in its application, in that it encourages arbitrary, capricious, and discriminatory action against tax protestors and taxpayers who choose to exercise their Federal First Amendment rights to protest and petition the Tax Court for the redress of their grievances. In this case the Tax Court labeled petitioner a tax protestor, for exercising his Federal First Amendment right to protest and petition the Tax Court for the redress of his grievances.

The right to petition the Tax Court is protected by the Federal First Amendment. Rager v. C.I.R., 775 F.2d 1081 (9th Cir.1985).

26 U.S.C. Section 6673, is a bill of attainder, unconstitutional under U.S. Const.art. I, Section 9, cl. 3, in that the Tax Court uses it to penalize petitioner as a purported member of a specific group (Tax Protestors) for exercising his Federal First Amendment right to protest and petition this Court for the redress of his grievances. Thus 26 U.S.C. Section 6673 is a bill of attainder. Ueckert v.U.S., 581 F.Supp. 1262 (D.C.N.D. 1984); Bearden v. C.I.R., 575 F.Supp. 1459 (D.C.Utah 1983).

In U.S. v. Amon, 669 F.2d 1351, 1364 (10th Cir 1981) Judge McKay states in pertinent part that:

It is hard to imagine a kind of political protest more consistent with the most cherished traditions of this nation than protest focusing on the laws of taxation. Certainly no form of protest is more American. It was, after all, protest against the Stamp Act which helped set in motion the chain of events which won for this nation its independence from a repressive King George and led to the enshrining in the first amendment of the right to protest.

Furthermore, tax protest is neither modern nor American in its origin. Many people venerate one who commented on the publicans who collected the taxes in his time.

And when the Pharisees saw it, they said unto his disciples, why eateth your Master with publicans and sinners?

But when Jesus heard that, he said unto them, They that be whole need not a physician, but they that are sick.

... I am not come to call the righteous, but sinners to repentance. Matthew 9:11-13.

In the case at bar 26 U.S.C. Section 6673 damages are used to repress the petitioner's constitutionally protected right to protest the tax laws and procedures used and promulgated by the respondent.

26 U.S.C. Section 6673 violates peti-

tioner's Federal First Amendment rights to protest and petition the Tax Court for the redress of his grievances, in that it penalizes him for the exercise thereof and does so in violation of his Federal Seventh Amendment right to trial by jury on the factual issues of willfulness and bad faith, May, supra, which are jury questions. U.S. v. Snepp, 595 F.2d 926 (4th Cir.1979). Boyd v. Bulala, 647 F. Supp. 781 (W.D.Va.1986).

City of Tucson, supra, stands for the proposition that taxing statutes should be strictly construed and any doubt should be resolved in favor of the taxpayer. At 1288, n.31. Taxing statutes are to be construed liberally in favor of the taxpayer. U.S. v. Havner, 101 F.2d 161 (8th Cir. 1939); U.S. v. Updike, 50 S.Ct. 367 (1930); Bowers v. New York & Lighterage Co., 47 S.Ct. 389

(1927): Gould v. Gould, 38 S.Ct. 53 (1917).

In the case at bar 26 U.S.C. Sec. 6673 damages were not liberally construed in favor of petitioner and were not strictly construed against the respondent.

The Tax Court lacks jurisdiction and is unconstitutional, in that it has no authority to impanel a civil jury on the factual issues of bad faith, willfulness, compensatory and punitive damages, and therefore violates petitioner's Federal Seventh Amendment rights to a civil jury on the above cited issues. Snepp and Boyd, supra.

The United States District Court for the Western District of Virginia, Harrisonburg Division denied respondent's motion for sanctions against the petitioner for willfully filing a frivolous injunction

for preliminary relief. The District Court's refusal to grant respondent's request for sanctions against the petitioner for willfully filing a frivolous action clearly demonstrates that the damages awarded against the petitioner by the Tax Court and the Fourth Circuit were erroneous in that they were not based on willfulness as required by law, in that petitioner's claims were nearly the same for all three of the aforesaid Courts.

Thus Fourth Circuit's decision to approve the tax court's imposition of 26 U.S.C. Section 6673 damages against petitioner, conflicts with and is contrary to the decisions of the Eighth and Third Circuits in that said penalty statute is unconstitutional on its face and in its application.

4. 28 U.S.C. Section 1912, And Rule 38

Of The Federal Rules Of Appellate Procedure are unconstitutional on their face and as applied by the Fourth Circuit it it conflicts with the decisions of the Tenth Circuit.

Said statute and rule violate the petitioner's First, Fifth and Seventh Amendment rights: a) to petition this Court for a redress of his grievances; b) to due process of law; and c) to trial by jury on the factual issue of damages, respectively.

In Autorama Corp. v. Stewart, 802 F.2d 1284 (10th Cir. 1986) the Tenth Circuit held that before damages pursuant to FED. R.APP.P. 38 and 28 U.S.C. Section 1912 can be imposed, the prevailing party is required to clearly show that appeal was filed in bad faith, that the arguments were wholly without merit, and appeal was

filed as a delay tactic.

In the case at bar the Fourth Circuit summarily awarded damages against the petitioner, without a clear showing of bad faith, frivolity and dilatory tactics, without a trial by jury on the factual issues of damages, willfulness, and badfaith. It is a blatant abuse of discretion and power by the Fourth Circuit to award damages against the petitioner for exercising his natural and fundamental rights to pursue his First Amendment rights to petition and appeal to the Fourth Circuit for a redress of his grievances.

5. Income tax returns and the laws thereof are unconstitutional on their face and in their application.

The petitioner should not be penalized and compelled to prepare and complete testimonial returns or statements or

hire others to do so, in that the tax laws and rules are so complicated that even the IRS cannot completely understand it.

Rodriguez v. United States, 629 F.Supp. 333, 336 (N.D.ILL. 1986) states in pertinent part that:

> ... the maze of statutes which govern the assessment and collection of taxes, tax liens, tax levies, refunds and so on, ...have erected a system described by one federal court as "unworkable" and "so complicated that even the IRS admits it cannot completely understand it." White v. Commissioner of Internal Revenue, 537 F.Supp. 679, 689 (D.Colo. 1982).

In U.S. v. Burton, 575 F.Supp. 1320 (E. D.Tex.1983), the District Court held that the mass of taxpayers are easily confused by this nation's tax laws and statutes. Therefore respondent erred in imposing 26 U.S.C. Secs. 6651(a)(10), 6653(a)(1)(A) & (a)(2),6654, 6661(c) penalties against petitioner, in that said

penalty statutes are unconstitutional on their face and in their application because said statutes fail to provide for the petitioner's Seventh Amendment rights to trial by jury on the issues of willfulness, negligence or intentional disregard of tax laws and unconstitutionally penalize petitioner for being unable to understand and comprehend tax forms and laws, which the IRS and the mass of taxpayers are also unable to understand or comprehend completely.

The income tax return required to be filed by petitioner, and the perjury clause contained therein is unconstitutional, in that it violates the void-for-vagueness doctrine. In U.S. v. Mackenzie, 777 F.2d 811 (2nd Cir.1985), The Second Circuit states in relevant part that the void-for-vagueness doctrine

requires:

... that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.....

The income tax return cites the perjury statute, but fails to clearly cite what conduct is prohibited, in that perjury requires that statements be made under oath or affirmation, yet in the instant case no such oath is made or required in or on said income tax return. Said ambiguity and vagueness encourages arbitrary and discriminatory enforcement by the respondent and his agents.

In U.S. v. Moore, 627 F.2d 830 (7th Cir.1980), the Seventh Circuit states in relevant part that:

Perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest an genuine endeavor to satisfy the law. (citations omitted)

In the instant case the respondent and his agents require petitioner to file a return that is a nullity, in that it fails to require that said return be sworn to as required by the Seventh Circuit, supra. In Mosher v. I.R.S., 775 F.2d 1292 (5th Cir.1985), the Fifth Circuit stated in pertinent part that:

> ... There can be no doubt regarding the status of a tax form that is not verified under penalties of perjury as the Supreme Court held over fifty years ago that an unsworn tax return fails to satisfy the requirements of law.....

Thus income tax returns and laws thereof are unconstitutional and violate the void-for-vagueness doctrine.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Dated this 11th day of May, 1989.

Respectfully submitted,

Stanley Sterner
Petitioner Pro Se
2544 Wilson Blvd.
Apartment No. 104
Winchester Va. 22601
(703) 667-6246

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2562

STANLEY STERNER
Petitioner-Appellant

V.

COMMISSIONER OF
INTERNAL REVENUE
Respondent-Appellee

Appeal from the United States Tax Court. Chief Judge Samuel B. Sterrett. (Tax Ct. No. 39457-87)

Submitted: November 28, 1988 Decided: January 20, 1989

Before SPROUSE and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Stanley Sterner, Appellant Pro Se. William Shepard Rose, Jr., Bruce Raleigh Ellisen, Gary R. Allen, William F. Nelson (U.S. DEPARTMENT OF JUSTICE) for Appellee.

PER CURIAM:

Stanley Sterner appeals from a tax court decision upholding an IRS deficiency determination and imposing sanctions for maintaining a frivolous action.

Sterner forwards the following arguments in this Court: (i) that the IRS failed to prepare returns for him, thereby rendering its determination of deficiency void; (ii) that penalizing him for failing to file tax returns is in violation of his fifth amendment privilege not to be a witness against himself; (iii) that he should have been afforded a jury trial; (iv) that the Commissioner's motion to dismiss should have been denied; and (v) that the tax court's sanction was improper because he was simply exercising his constitutional right to litigate. We affirm.

Sterner's arguments are manifestly frivolous. The Commissioner is not obliged to prepare a return on a taxpayer's behalf before determining a deficiency. Roat v. Commissioner, 847 F.2d 1379, 1381

(9th Cir. 1988). As to Sterner's fifth amendment claim, "[t]here is no constitutional right to refuse to file an income tax return." California v. Byers, 402 U.S. 424, 434 (1971). The tax court properly denied Sterner's request for a jury trial on the basis that there is no right to a jury trial in tax court. See McCoy v. Commissioner, 696 F.2d 1234, 1237 (9th Cir. 1983). The court properly granted the Commissioner's motion to dismiss because Sterner failed to meet his burden to set forth facts showing that the Commissioner's deficiency determination was incorrect. See Taylor v. Commissioner, 771 F.2d 478, 480 (11th Cir. 1985). Contrary to Sterner's arguments, we find no unconstitutionality, either on its face or as applied, in the tax court rule governing motions to dismiss. Tax Ct. R. 34(b). Finally, we approve

the tax court's imposition of the penalty provided for by 26 U.S.C. § 6673: Sterner has no constitutional right to litigate frivolous claims without being sanctioned. See Larsen v. Commissioner, 765 F.2d 939, 941 (9th Cir. 1985).

Finding this appeal frivolous, we award the Commissioner attorneys' fees and double costs incurred on appeal. See 28 U.S.C. § 1912: Fed.R.App.P.38. The amount of $1500 requested by the Commissioner in lieu of particularized fees and costs is approved.*

We dispense with oral argument because this appeal is frivolous and affirm the tax court's judgment.

AFFIRM AND SANCTIONS IMPOSED.

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* We note that this Court has awarded lump sum sanctions in Dixon v. Commissioner, No. 87-3528 (4th Cir. Dec. 15, 1987)(un-

published): Yoder v. Commissioner, No. 87-2072 (4th Cir. Nov. 27, 1987)(unpublished): Peeples v. Commissioner, No. 87-1053 (4th Cir. Sept. 23, 1987)(unpublished): Leining v. Commissioner, No. 86-1253) (4th Cir. July 21, 1987)(unpublished): United States v. Bowser, No. 86-1241 (4th Cir. April 22, 1987)(unpublished): United States v. Wissig, No. 86-1188 (4th Cir. Dec. 29, 1986)(unpublished): Chapman v. Egger, No. 85-2151 (4th Cir. Oct. 21, 1986)(unpublished): Jensen v. United States, No. 86-1504 (4th Cir. June 25, 1986)(unpublished), motion for accounting and cert. denied, 55 U.S.L.W. 3278 (U.S. Oct. 20, 1986).

APPENDIX B

UNITED STATES TAX COURT

STANLEY STERNER, Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 39457-87.

Entered: March 15, 1988

ORDER OF DISMISSAL AND DECISION

Upon consideration of the record herein, and for reasons appearing in the memorandum sur order of the Special Trial Judge, which is hereto attached and served here-

with and which we approve and adopt, it is

ORDERED that respondent's motion to dismiss for failure to state a claim upon which relief can be granted, filed on February 4, 1988, is hereby granted. It is further

ORDERED and DECIDED that there are deficiencies in petitioner's Federal income taxes and additions to tax as follows: a. tax deficiencies for calendar years 1981, 1982, 1983 and 1984 in the amounts of $5,945, $10,077, $6,486 and $5,233 respectively; b. Section 6651(a)(1) penalties in the amounts of $628, $1,019, $706.50, $333.73 for the taxable years of 1981 - 1984 respectively; c. Section 6653(a)(1)(A) penalties in the amounts of $297.25, $503.85, $324.30, $261.65 for tax years 1981, 1982, 1983 and 1984 respectively; d. Section 6653(a)(1)(B)

penalties for tax years 1981-1984 respectively which amounts to 50% of the interest due on the underpayment of tax attributable to negligence or intentional disregard of rules or regulations: e. Section 6654 penalties in the amounts of $126.68, $249.69 $116.76, $22.66 for calendar years 1981, 1982, 1983 and 1984 respectively: and f. Section 6661 penalties in the amounts of $1,019, $706.50, $333.73 for calendar years 1982, 1983, and 1984 respectively and that damages are due from petitioner which are hereby awarded to the United States in the amount of $5,000 pursuant to sec. 6673, I.R.C. of 1954, as amended.

(Signed) Samuel B. Sterrett

Chief Judge

APPENDIX C

UNITED STATES TAX COURT

STANLEY STERNER, Petitioner,

V.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 39457-87.

Entered: March 15, 1988

MEMORANDUM SUR ORDER

This case was assigned to the undersigned for consideration and ruling pursuant to the provisions of section 7456 (c) and (d)[1] and Rule 180. It is the Court on respondent's motion to dismiss for failure to state a claim upon which relief can be granted and for damages filed, pursuant to Rule 40 and section 6673, on February 4, 1988. Petitioner filed an objection on February 25, 1988.

On October 2, 1987, respondent issued a notice of deficiency determining the

[1] All section references are to the Internal Revenue Code of 1954, as amended, and all Rule references are to the Tax Court Rules of Practice and Procedure, except as otherwise noted.

following deficiencies in petitioner's Federal income taxes and additions to tax:

a. tax deficiencies for calendar years 1981, 1982, 1983 and 1984 in the amounts of $5,945, $10,077, $6,486 and $5,233 respectively: b. Section 6651(a)(1) penalties in the amounts of $628, $1,019, $706.50, $333.73 for the taxable years of 1981 - 1984 respectively; c. Section 6653(a)(1)(A) penalties in the amounts of $297.25, $503.85, $324.30, $261.65 for tax years 1981, 1982, 1983 and 1984 respectively; d. Section 6653(a)(1)(B)[2]

[2] Sections 6653(a)(1)(A) and 6653(a)(1)(B), as per the Tax Reform Act of 1986, Pub. L. 99-514. Prior to the Tax Reform Act of 1986, these additions to tax were sections 6653(a)(1) and 6653(a)(2).

penalties for tax years 1981-1984 respectively which amounts to 50% of the interest due on the underpayment of tax

attributable to negligence or intentional disregard of rules or regulations: e. Section 6654 penalties in the amounts of $126.68, $249.69 $116.76, $22.66 for calendar years 1981, 1982, 1983 and 1984 respectively; and f. Section 6661 penalties in the amounts of $1,019, $706.50, $333.73 for calendar years 1982, 1983, and 1984 respectively.

These determinations were based upon the following adjustments to petitioner's income for the years in question: a. F&M National Bank(W-2 income) in the amount of $3,907 for tax year 1981; b. Dividends (after exclusion) in the amount of $3,586 for tax year 1981; c. Unemployment compensation in the amount of $122 for tax year 1981; d. F&M National Bank(Interest income) in the amounts of $230, $166, $273 for tax

years 1981, 1982, 1983 respectively; e. Army Corps of Engineers(W-2 income) in the amounts of $18,308, $33,183, $26,509, $28,243.27 for tax years 1981-1984 respectively; f. Gov't. Investors Trust (Dividends) in the amounts of $2,586, $324 for tax years 1982, 1983 respectively; g. GIT Insurance Money Acct.(Dividends) in the amount of $116 for tax year 1983; h. First Variable Rate Fund(Dividends) in the amounts of $2,002, $237 for tax years 1982, 1983 respectively; i. Old Dominion S&L(Interest) in the amount of $19 for tax year 1982; j. Calvert Security(Dividends) in the amount of $3,337 for tax year 1983; k. Jefferson National Bank(Interest) in the amount of $212 for tax year 1983; l. Personal exemption in the amounts of ($1,000) for each of the tax years of 1981-1984; m. Total Adjustments in the amounts of $25,153, $36,956,

$30,008, $27,243.27 for tax years 1981-1984 respectively.

At the time the petition was filed, petitioner's legal residence was Winchester, Virginia.

In the motion to dismiss, respondent alleges that the assignments of error in the petition present no claim, and petitioner alleges no justiciable facts in support of any error as required by Rule 34(b)(4) and (5).

Petitioner alleged simply that respondent erred in making the determinations of tax and additions to tax in the notice of deficiency. In support of his allegation that respondent erred in his determinations, petitioner alleged a multitude of "facts" in supporrt of his allegations of error: (1) That the Secretary (hereinafter "respondent") failed to prepare

and file income tax returns for him: (2) That respondent did not previously assess him (petitioner) for the deficiencies and additions to tax prior to issuance of the notice of deficiency; (3) That the respondent never billed petitioner for the amounts determined in the notice of deficiency: (4) That Congress is required to assess and collect income taxes under the 16th Amendment to the United States Constitution and not the "people;" (5) That respondent did not make a "determination" of the deficiencies and additions to tax within the meaning of Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987) and, therefore, the notice of deficiency is invalid; (6) That the income tax system is based on voluntary assessment and payment of taxes; therefore, petitioner was not obligated to file returns and pay taxes if he did not choose to do so; (7)

That, to the extent certain sections of the Internal Revenue Code or the 16th Amendment to the United States Constitution require the filing of income tax returns, such sections of the Code and the 16th Amendment are unconstitutional, because, by requiring taxpayers to produce rfecords (income tax returns) which would disclose incriminatory information, the 5th Amendment to the United Constitution is violated. Alternatively, where the word "shall" appears in those sections of the Code requiring the filing of income tax rreturns, the word is permissive and not mandatory, thus avoiding the constitutional violation: (8) That tax statutes should be construed liberally in favor of taxpayers and that taxpayers should not be compelled to prepare returns for the reason that the tax

laws are too complex; (9) That the requirement that all income tax returns be filed under penalties of perjury is unconstitutional, because the criminal offense constituting perjury is vague and not defined; (10) That respondent's agents, intentionally and with malice, violated petitioner's "other rights."

In the prayer of his petition, petitioner requested that a jury be empaneled to consider the imposition of $3 billion in compensatory and punitive damages against respondent.

In his objection to respondent's motion to dismiss, petitioner denied that his petition failed to allege justiciable errors and facts in support of his case: that section 6673 is unconstitutional and that, if the Tax Court lacks authority to impanel a civil jury to consider his claim for compensatory and punitive

damages, the Tax Court itself is unconstitutional.[3]

[3] Petitioner advanced no explanation why he elected to litigate his tax dispute with the Tax Court when he is of the opinion that the Court is unconstitutional.

Petitioner's plethora of claims listed above have little or no merit but, nevertheless, can be addressed in simple, basic pronouncements, which have been made by this Courtand other courts in numerous other cases which have come to be known as "tax protest" cases.

At the outset, petitioner's contention that respondent failed to make a "determination" of the deficiencies against him is without merit. In Scar v. Commissioner, supra, respondent issued a notice of deficiency in which the only adjustment to the taxpayers' return was that of a tax shelter in which the tax-

payers were not involved. The Ninth Circuit held that respondent had failed to make a "determination" of a deficiency, and the notice of deficiency was deemed invalid. The facts of this case are entirely different from Scar. The notice of deficiency here was accompanied by several pages of explanatory statements clearly identifying the adjustments by amount and the source from which such information was obtained, i.e., Forms 1099, W-2s, etc. Neither in the petition nor his objection did petitioner challenge the accuracy of these adjustments. Petitioner did not deny receiving the items of income shown as adjustments on the notice of deficiency. It is evident, therefore, and the Court finds that respondent made a "determination" within the meaning of Scar. Petitioner's challenge to the notice of deficiency is

denied.

Petitioner's claim that he was not previously assessed and that he was not billed for the determinatioins in the notice of deficiency are without merit. Under section 6213, respondent is expressly prohibited from making an assessment against a taxpayer while the time for filing a petition with this Court is pending. This prohibition continues until such time as a decision by this Court becomes final.

All taxpayers with taxable income are generally required by law to file Federal income tax returns. Section 6012. Under sections 6651 and 7203, taxpayers who fail to file returns may be subject to civil additions to the tax and prosecution for criminal offenses. Therefore, the matter of filing tax returns and pay-

ing taxes is not voluntary. Respondent is authorized under section 6213 to issue notices of deficiency for determined deficencies and/or additions to tax. Respondent issued a valid notice of deficiency, a timely petition was filed with this Court and, therefore, this Court has exclusive jurisdiction. Sections 6212, 6213, and 6214.

It is well settled that the determinations made by respondent in a notice of deficiency are presumed correct; the burden of proof is on petitioner, not respondent, to show that the determinations are wrong, and the imposition of the burden of proof is constitutional. Welch v. Helvering, 290 U.S. 111 (1933); Rockwell v. Commissioner, 512 F.2d 882, 887 (9th Cir. 1975), cert. denied 423 U.S. 1015 (1973); Rule 142(a). This Court generally will not look behind a deficiency no-

tice to examine evidence used or the propriety of the Commissioner's motives or of the administrative policy or procedures involved in making his determinations. Proesal v. Commissioner, 73 T.C. 600 (1979); Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 327 (1974).

Petitioner's due process rights have not been abrogated or abridged. Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979). The general assertion that Fourth and Fifth Amendment rights have been violated is without merit. In Edwards v. Commissioner, 680 F.2d 1268, 1270 (9th Cir. 1982), the court, in affirming a decision of this Court in a tax protester case and awarding double costs to the appellee (the Commissioner of Internal Revenue) said --"* * * Requiring taxpayers, who institute civil proceedings protesting

deficiency notices, to produce records or face dismissal constitutes no invasion of privacy or unlawful search or seizure." Accord, McCoy v. Commissioner, 696 F.2d 1234 (9th Cir. 1983), affg. 76 T.C. 1027 (1981), where the court reached the same result in another tax protester case. To invoke the Fifth Amendment privilege, petitioner must be faced with a substantial hazard of self-incrimination which is real and appreciable, and petitioner must have reasonable cause to apprehend such danger. The privilege may not itself be used as a method of evading payment of lawful taxes. McCoy v. Commissioner, supra. Petitioner has not alleged any facts as a basis for the Fifth Amendment.

Petitioner's request for the empaneling of a jury for purposes of determining compensatory and punitive damages against respondent is without merit. Litigants

before Tax Court are not entitled to a jury trial, and it has been repeatedly held that there is no constitutional right to a jury trial in the Tax Court. See Rowlee v. Commissioner, 80 T.C. 1111, 1115 (1983). The Court notes, however, that, under section 7430, a taxpayer may be entitled to recover litigation costs in the Tax Court against respondent if certain requisites are met. One requisite is that taxpayer must be "prevailing party" in the litigation. Under section 7430(c)(2)(A)(i), a "prevailing party" means any party who establishes that the position of the UnitedStates in the civil proceeding was not substantially justified. Petitioner has not shown that respondent's position in this case was not substantially justified. Moreover, litigation costs do not include compensatory

or punitive damages.

Court decisions have sustained the constitutionality of the Board of Tax Appeals and the Tax Court of the United States in the exercise of the jurisdiction conferred upon them by Congress. Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (5th Cir. 1966), cert. denied 385 U.S. 918 (1966); Martin v. Commissioner, 358 F.2d 63 (7th Cir. 1966). In Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392, 395 (1971), this Court held that the Tax Reform Act of 1969, in establishing the United States Tax Court as a court under Article I of the United States Constitution, did not violate Article III of the Constitution. The United States Tax Court, therefore, is constitutional. See also Willis v. Kurtz, 575 F.2d 495 (5th Cir. 1978); Simanonok v. Commissioner, 731 F.2d 743

(11th Cir. 1984).

Rule 34(b)(4) requires a petitioner challenging a notice of deficiency to allege "clear and concise assignments of each and every error which the petitioner alleges to have been committedby the Commissioner in the determination of the deficiency or liability." Rule 334(b)(5) requires the petitioner to allege "clear and concise lettered statements of the facts on which petitioner bases the assignments of error* * *."

Rule 40 provides that respondent may file a motion to dismiss for failure to state a claim upon which relief can be granted prior to filing an answer. Generally, the Court may dismiss the petition on motion when it appears beyond doubt that the taxpayer can prove no set of facts in support of his claim which

would entitle him to relief. Conley v. Gibson, 355 U.S.41, 445-46 (1957); Price v. Moody, 677 F.2d 676, 677 (8th Cir. 1982).

The Court finds that petitioner has not alleged facts upon which his case is based under Rule 34(b)(5). All petitioner has alleged are various statutory and constitutional objections to the tax system, all of which are legal in nature and none of which are supported by case law. Such broad allegations clearly do not come close to the requirement of Rule 34(b)(5) that a petitioner must allege "clear and concise lettered statements of the facts on which petitioner bases the assignments of error." This Rule requires an allegation of specific facts which, if true, would establish the case of petitioner. Martin Band Instrument Co. v. Commissioner, 2 B.T.A.

963 (1925).

We conclude, therefore, that respondent's motion to dismiss for failure to state a claim upon which relief can be granted is proper and, accordingly, respondent's motion is granted.

Repondent requested damages under section 6673. Under that section, whenever it appears to the Court that proceedings before it have been instituted or maintained primarily for delay or where the taxpayer's position in such proceedings is frivolous or groundless, damages shall be awarded the United States in an amount not to exceed $5,000. See Grimes v. Commissioner, 82 T.C. 235, 239 (1984); Beard v. Commissioner, 82 T.C. 766, 781 (1984), affd. 793 F.2d 139 (6th Cir. 1986). Petitioner is a classic tax protester. His allegations have abso-

lutely no merit, and we, accordingly, conclude that his maintenance of this case has been primarily for delay. The positions asserted in his petition are frivolous and groundless. Respondent's motion for damages, therefore, is granted, and damages are awarded the United States in the amount of $5,000.00.

(Signed) D. Irvin Couvillion
D. Irvin Couvillion
Special Trial Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2562

STANLEY STERNER
Petitioner-Appellant

V.

COMMISSIONER OF
INTERNAL REVENUE
Respondent-Appellee

Filed: Feb 15 1989

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's pro se petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins, for a panel composed of Judge Sprouse, Senior Judge Butzner, and Judge Wilkins.

For the Court

John M. Greacen

CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2562

STANLEY STERNER
Petitioner-Appellant

V.

COMMISSIONER OF
INTERNAL REVENUE
Respondent-Appellee

Filed: Feb 2 1989

O R D E R

Pursuant to this Court's decision of January 20, 1989 and the government's bill for damages,

IT IS ORDERED that the Commissioner is awarded attorneys' fees and double costs in the amount of $1,500.00.

For the Court

John M. Greacen

CLERK

APPENDIX F

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF VIRGINIA HARRISONBURG

DIVISION

STANLEY STERNER, Plaintiff

V.

COMMISSIONER OF INTERNAL REVENUE,
Defendant

CIVIL ACTION NO. 89-0002-H

Entered: February 3, 1989

JUDGE JAMES H. MICHAEL, JR.

O R D E R

For the reasons stated in open court on January 31, 1989, it is hereby

ADJUDGED AND ORDERED

that: 1. Plaintiff's motion for a preliminary injunction shall be, and it hereby is denied. 2. Defendant's motion to dismiss shall be, and it hereby is, granted. 3. Defendant's motion for sanctions shall be, and it hereby is, denied. 4. This action shall be, and it hereby is, dismissed with prejudice and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order to the plaintiff and to all counsel of record.

ENTERED: _____
Judge

February 3, 1989
_____
Date

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STANLEY STERNER,
Petitioner Pro Se

v. No. 88-2562

COMMISSIONER OF INTERNAL REVENUE
Respondent

Filed: May 11th, 1989

NOTICE OF PETITION FOR CERTIORARI
IN THE SUPREME COURT OF
THE UNITED STATES

Notice is hereby given that Stanley Sterner, Petitioner-Appellant above named, hereby petitions the Supreme Court of the United States from the

judgment of the United States Court of Appeals for the Fourth Circuit decided January 20, 1989, rehearing denied by order dated February 15, 1989, affirming the judgment of the United States Tax Court dated March 15, 1988.

This Petition is taken pursuant to 28 U.S.C. §1254(1) and Rule 17.1(a) and (c) of the Rules of the Supreme Court of the United States.

Dated this 11th day of May, 1989.

Respectfully submitted,

Stanley Sterner
Petitioner Pro Se
2544 Wilson Blvd.
Apartment No. 104
Winchester Va. 22601
(703) 667-6246

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 1989, the foregoing Notice of Petition for Certiorari for the Petitioner was mailed or delivered to:

William S. Rose, JR.
Assistant Attorney General
Tax Division
Department of Justice
P.O. Box 502
Washington, D.C. 20044
(202) 633-3361

Solicitor General
Department of Justice
Washington, D.C. 20530

Stanley Sterner

APPENDIX H

CONSTITUTION, STATUTES AND REGULATIONS

Article I, Section 1, of the United States Constitution provides, in relevant part:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 9, Clause 3 of the United States Constitution provides, in relevant part:

No Bill of Attainder or ex post facto Law shall be passed

The Federal First Amendment to the Constitution provides, in relevant part:

Congress shall make no law * * * prohibiting * * * or abridging the * * * right of the people * * * to petition the Government for a redress of grievances.

The Federal Fifth Amendment to the Constitution provides, in relevant part:

No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * * .

The Federal Seventh Amendment to the Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Federal Ninth Amendment to the Constitution provides:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Sixteenth Amendment of the Federal Constitution, states in relevant part that:

The Congress shall have the power to lay and collect taxes on incomes ...

26 U.S.C. Section 6020(a) states in pertinent part that:

... the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person. (emphasis added)

26 U.S.C. Section 6020(b)(1), states in relevant part that:

If any person fails to make any return required by an internal revenue law or regulation made thereunder at the time prescribed therefor, ..., the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise. (emphasis added)

26 U.S.C. Section 6201, states in relevant part that:

(a)The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes imposed by this title, ... Such authority shall extend to and include the following:
(1)The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title....(Emphasis Added)

26 U.S.C. §6211(a) provides in relevant part:

* * * the term "deficiency" means the amount by which the tax imposed * * * exceeds the excess of (1) the sum of * * * (B) the amounts previously assessed (or collected without assessment) as a deficiency * * *

26 C.F.R. §301.6211-1(a) provides in relevant part:

* * * the term "deficiency" means the excess of the tax * * * over the sum of the * * * amounts previously assessed (or collected without assessment) as a deficiency * * * If no return is made, or if the return * * * does not show any tax, for the purpose of the definition "the amount shown as the tax by the taxpayer upon his return" shall be con-

sidered as zero. Accordingly in any such case, if no deficiencies with respect to the tax have been assessed, or collected without assessment, and no rebates with respect to the tax have been made, the deficiency is the amount of income tax imposed * * *

26 U.S.C. §6651 provides in relevant part:

In case of failure (1) to file any return required * * * on the date prescribed therefor * * * unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate * * *

26 U.S.C. §6653(a)(1)(A) and (B) provides in relevant part:

If any part of any underpayment (as defined in subsection(c)) is due to negligence or disregard of rules or regulations, there shall be added to the tax an amount equal to the sum of (A) 5 percent of the underpayment, and (B) an amount equal to 50 percent of the interest payable under section 6601 with respect to the portion of such underpayment which is attributable to negligence

for the period beginning on the last date prescribed by law for payment of such underpayment * * * and ending on the date of the assessment of the tax (or, if earlier, the date of payment of the tax).

26 U.S.C. §6654(e)(3)(A) provides in relevant part:

No addition to tax shall be imposed under subsection (a) with respect to any underpayment to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.

26 U.S.C. §6661(c) provides in relevant part:

The Secretary may waive all or any part of the addition to tax provided by this section on a showing by the taxpayer that there was reasonable cause for the understatement (or part thereof) and that the taxpayer acted in good faith.

26 U.S.C. §6673 provides in relevant part:

Whenever it appears to the Tax Court that proceddings before it have been instituted or maintained by the taxpayer primarily for delay, that the taxpayer's position in such proceeding is frivolous or groundless, * * * damages in an

amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision. * * *

26 U.S.C. §7805(a) provides in relevant part:

* * * the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

28 U.S.C. §1912 provides:

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Federal Rules of Appellate Procedure

Rule 38 provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 11 of the Federal Rules of Civil Procedure provides, in relevant part:

* * * A party who is not represented by an attorney shall sign his pleading and state his address. * * * The signature

of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. * * *